STATE OF MICHIGAN

COURT OF APPEALS

SALEEM CHAUDHARY,

Plaintiff/Counterdefendant-Appellant,

v

JDS PUMP N GO, LLC and STEPHAN MAZUR,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
May 14, 2020

No. 347000
Oakland Circuit Court
LC No. 2017-162435-CZ

Before: K. F. KELLY, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants concerning plaintiff's breach-of-contract and silent fraud claims and defendants' breach-of-contract claim. For the reasons set forth in this opinion, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This appeal arises from a contractual dispute between the parties. Beginning in May 2004, plaintiff rented space for his airplane in a hangar located at the Troy, Michigan airport, then owned by JDS Pump N Go, LLC (JDS), and managed by Stephan Mazur. The parties initially entered into a written lease agreement, which was renewed and modified through various written addendums. After the expiration of the last written addendum in 2009, the parties entered into an oral agreement for the continued storage of the airplane in the hangar. Under the terms of this oral agreement, plaintiff was to pay defendants $200 per month.

During the next several years, plaintiff encountered difficulties in making timely rent payments and his account with JDS often fell into arrears. Plaintiff's failure to pay rent resulted in defendants removing the airplane from the hangar for a brief period in 2011. However, the parties apparently resolved their differences as the airplane was again placed inside of the hangar. The airplane remained stored in the hangar until, at an unidentified time, it was again removed from the hangar. In August of 2017, plaintiff received a telephone call from an unidentified individual interested in purchasing the airplane. The individual informed plaintiff that the airplane

had been sitting outside the hangar for several years and had fallen into disrepair. Plaintiff telephoned Mazur who informed plaintiff that the airplane had been placed outside the hangar the previous week. After this conversation, plaintiff—who had not gone to the hangar on a regular basis since 2011—went to the hangar to inspect the airplane. He found the airplane in serious disrepair, with damage to the interior and exterior of the airplane, as well as to its avionics. Plaintiff removed the airplane from the premises with the assistance of the airport's manager and an aircraft mechanic, both of whom informed plaintiff that the airplane had been outside of the hanger for a period longer than one week.

Plaintiff filed a complaint against defendants, alleging defendants had breached the oral lease agreement by removing the airplane from the hangar two years earlier. Additionally, plaintiff's complaint alleged Mazur committed silent fraud by not informing plaintiff of the airplane's removal from the hangar. Defendants counterclaimed, alleging that plaintiff breached the oral lease agreement by failing to pay rent for the airplane's storage.[1] Following completion of discovery, defendants filed a motion for summary disposition on all claims under MCR 2.116(C)(10). The trial court entered a scheduling order which directed plaintiff's "responsive motion and supporting brief shall be filed and received by the Court and opposing counsel on or before November 21, 2018 by 4:30 p.m. If [plaintiff's] responsive motion and supporting brief is not timely filed the Court will assume there is no law to support the party's position."

Plaintiff's counsel filed his response at 10:57 p.m. on November 21, 2018, several hours after the deadline set in the scheduling order. The trial court informed plaintiff at oral argument that it declined to consider the contents of plaintiff's response because it was not filed by the trial court's stated deadline. Additionally, at oral argument, defendants relied on their briefs and the trial court thereafter waived any oral argument.

The trial court then made findings on the record and through a written opinion and order. Concerning the breach-of-contract claims, the trial court found that (a) a contract existed between the parties, (b) plaintiff had breached the contract by failing to pay rent in accordance with the contract's terms, (c) plaintiff's failure to pay rent constituted the first substantial breach of the contract, and (d) defendants sustained damages. As a result, the trial court found "defendants are entitled to summary disposition of plaintiff's breach-of-contract claim against them and entitled to summary disposition on their own breach-of-contract claim . . ." The trial court also found, as to plaintiff's claim of silent fraud, that plaintiff "failed to allege any separate or distinct duty defendants owed him other than those provided for in the contract." As a result, the trial court opined that Mazur was entitled to summary disposition concerning plaintiff's silent fraud claim. The trial court's written order also resolved the other claims alleged in plaintiff's complaint and defendants' countercomplaint. Consequently, the trial court entered a judgment of $17,600 in favor of defendants. This appeal ensued.

II. ANALYSIS

[1] The parties alleged additional causes of action in their complaints. However, because these additional causes of action are not raised on appeal, they are not included in our summation of events.

On appeal, plaintiff asserts the trial court abused its discretion by choosing not to consider his untimely-filed response or to allow his counsel to participate in oral argument. Plaintiff did not raise either of these issues before the trial court, hence they are unpreserved.

"Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court." *Hines v Volkwagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005) (citation omitted). The record is devoid of any evidence that plaintiff objected either to the trial court's decision not to consider his responsive brief or its decision not to allow plaintiff's counsel to offer oral argument. Instead, plaintiff's assignment of error and the arguments supporting it are made for the first time on appeal. Hence, this issue is not properly preserved. *Hines*,265 Mich App at 443. A party's failure to properly preserve an issue in a civil case usually precludes appellate review. However, this Court "may overlook preservation requirements . . . if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). We decide to address this issue in order to provide the parties with a comprehensive adjudication of their issues, though in doing so, we emphasis that we are not required to do so. Additionally, we exercise our discretion to overlook preservation of the issue because the issue involves a question of law and the record contains the facts required for its resolution.

Generally, we "review[] for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kermerko Clawson, LLC, v RXIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005). "An abuse of discretion involves more than a difference in judicial opinion." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Rather, "an abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 216; 818 NW2d 478 (2012) (quotation marks and citation omitted). This case also involves the interpretation of the court rules, which this Court reviews de novo. *Hill v L F Transp, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008). "A court by definition abuses its discretion when it makes an error of law." *In re Water Drain*, 296 Mich App at 220 (citation omitted)

However, this Court reviews unpreserved issues for plain error. *Hogg v Four Lakes Assoc, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000) (quotation marks and citation omitted). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d 482 (2017) (alteration in original, quotation marks and citation omitted).

As a general rule, a party filing a response to a motion for summary disposition must file its response at least seven days before the motion hearing. MCR 2.116(G)(1)(a)(ii).[2] However, the court rules provide an exception to this general rule, allowing a trial court to enter an order

[2] Our analysis uses the text and structure of the court rules in effect in 2018, which governed the filing of plaintiff's response to the motion for summary disposition.

setting a different time period for the filing of the response. MCR 2.116(G)(1)(b). If the trial court chooses to set a deadline other than that found in the general rule for the filing of a response, then it must be made in writing either "on the face of the notice of hearing" or by a separate order. MCR 2.116(G)(1)(b). Hence, these two rules set a general practice and authorize an exception to that general practice. In this case, the trial court entered a written scheduling order specifically stating the filing deadline for plaintiff's response and the consequences for failure to comply with the scheduling order.[3]

In situations as presented here, this Court has held that a trial court has the discretion to enter scheduling orders that differ from the timelines established by the general court rules. *Kermerko Clawson, LLC,* 269 Mich App at 350-351. Similarly, this Court has held a "trial court has the discretion to decline to entertain motions beyond the stated deadline." *Id*. at 349 (construing MCR 2.401(B)(2)). Seemingly, at issue then is whether it is also within the trial court's discretion not to consider an untimely-filed responsive brief. However, plaintiff does not argue that the trial court was devoid of the discretion as to whether to consider his untimely-filed responsive brief. Rather, he asserts that the trial court's decision not to consider his responsive brief constituted an "overly harsh" sanction.

Matters that are within the discretion of the trial court preclude this Court from exercising its judgement in lieu of that of the trial court. As instructed by our Supreme Court:

> An abuse of discretion involves far more than a difference in judicial opinion. [ ]It has been said that such abuse occurs only when the result is " 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985) . . . and noting that, although the *Spalding* standard has been often discussed and frequently paraphrased, it has remained essentially intact. This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters. For example, the Court stated: . . . It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been. And [this Court stated in 1889]: To warrant this Court in interfering in matters so entirely in the sound discretion of the circuit court as the granting or refusing of a new trial, the abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made. *Allen-Ziegler, Inc.*, 461 Mich at 227-228. (citations omitted).

[3] There is no dispute that plaintiff failed to comply with the deadline for filing his responsive brief.

Here, plaintiff concedes the inherent authority of the trial court to adopt and execute scheduling orders. Having conceded the trial court's inherent authority relative to scheduling order, what remains of plaintiff's argument is a request of this Court to substitute its judgment for that of the trial court. Such a request ignores well-established case law, as cited above, explicitly prohibiting this Court from interfering in matters within the discretion of the trial court. Such an argument also fails to illuminate any facts from which this Court could conclude there was no justification or excuse for the trial court's ruling. *Id*. at 228.

We additionally base our conclusion that plaintiff has failed to raise an argument on which relief can be granted from the fact that prior to his untimely filing, plaintiff never objected to the trial court's scheduling order. That order specifically set forth the penalty in the event plaintiff failed to file a timely response, namely, that "the Court will assume there is no law to support the party's position." Having been warned in advance of the consequences plaintiff faced for a late filing, and plaintiff having failed to object either to the trial court's order or its enforcement, it seems disingenuous for plaintiff to now characterize the trial court's ruling as harsh.[4] Accordingly, we discern no plain error which would entitle plaintiff to relief for the trial court's decision not to consider his untimely-filed responsive brief.[5]

Plaintiff also asserts that the trial court erred in granting summary disposition in favor of defendants because several factual disputes exist relative to plaintiff's silent fraud claim and defendants' breach-of-contract claims.

At the outset of our consideration of these questions, we note that plaintiff failed to properly present these questions for our review. In his appellate brief, plaintiff sets forth a singular question:

> Did the trial court commit reversible error when it refused to consider Appellant's summary disposition response brief that was filed on the same date it was due but a few hours late, and prohibited Appellant from participating in oral argument, where there was no prejudice to Appellee?

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[4] In response to plaintiff's additional arguments that Michigan law prefers disposition of cases on their merits rather than on procedural mistakes, we conclude that plaintiff's arguments on this issue fail to grasp either the procedural differences of the cases cited in his brief from the facts presented here, or the fact that ultimately, here, defendants were still required to prove that they were entitled to summary disposition pursuant to MCR 2.116(C)(10).

[5] Plaintiff also asserts the trial court erred in not allowing his trial counsel to present oral argument during the hearing on defendant's motion for summary disposition. As we have concluded, the trial court properly exercised its discretion when it denied consideration of plaintiff's untimely-filed responsive brief. Plaintiff has failed to produce any evidence from which this Court could conclude that the trial court abused its discretion by similarly concluding that by not filing a timely response, plaintiff had waived any right to oral argument. Consequently, plaintiff has failed to prove the trial court's decision not to allow him to participated in oral argument constituted plain error.

Within plaintiff's statement of questions involved, we discern no identification of questions as to whether the trial court erred by granting summary disposition in favor of defendants because genuine issues of material fact existed as to plaintiff's claim of silent fraud and defendants breach-of-contract claims. Plaintiff's failure to identify these separate questions runs contrary to MCR 7.212(C)(5) which states, in relevant part: " . . . *Each question must be expressed and numbered separately* and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it . . ." (emphasis added). Typically, when a party fails to adhere to MCR 7.212(C)(5), this Court will not consider the question because it was not included in the statement of questions presented. See, *Caldwell v Chapman* 240 Mich App 124, 132-133; 610 NW2d 264 (2000) (holding a defendant's failure to properly present an issue in the statement of questions presented constitutes waiver of the issue). However, we note this Court possesses the discretion to review a legal question not raised by the parties. *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004) (citation omitted). Even though plaintiff has failed to properly raise these questions, we nevertheless exercise our discretion again, in order to provide the parties with a comprehensive adjudication.

As previously stated, defendants moved for summary disposition pursuant to MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Defrain v State Farm Mut Auto Ins Co*, 491Mich 359, 366; 817 NW2d 504 (2012).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotation marks and citations omitted).]

Additionally, this Court reviews "de novo as a question of law the proper interpretation of a contract." *Patrick v Shaw*, 275 Mich App 201, 204; 739 NW2d 365 (2007), aff'd 480 Mich 1050 (2008).

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Following our review of the record evidence submitted in this matter, we conclude that a genuine issue of material fact exists concerning whether defendant breached the terms of the lease agreement.

As the parties acknowledge: "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. The party seeking to enforce a contract bears the burden of proving that the contract exists." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015) (citations

omitted). In his response to defendants' motion for summary disposition, plaintiff alleged the existence of a second oral agreement entered into by the parties in 2014. However, contrary to defendants' arguments that the parties entered into an implied contract governed by the terms of the written agreement, evidence presented to the trial court revealed that the parties entered into an express oral agreement governing the storage of the airplane. "Generally an implied contract may not be found if there is an express contract *between the same parties* on the same subject matter." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006) (emphasis in original; quotation marks and citation omitted). Thus, any contract that existed between the parties consisted of this oral agreement.

Additionally, the evidence presented at summary disposition fails to support defendants' assertion that plaintiff breached the terms of the oral agreement at the time the airplane was removed from the hangar. Defendants provided documentary evidence to the trial court, in the form of invoices and an affidavit by Mazur, demonstrating plaintiff's account with JDS was in arrears and he failed to pay his monthly rent for a significant period. Plaintiff admitted in his deposition testimony that he had failed to timely pay his rent on several occasions. Yet, apart from the claim in Mazur's affidavit, these issues evidenced by the invoices date from several years before the presumptive removal of the airplane from the hangar. Defendant also supplied a second affidavit from Mazur, alleging that plaintiff admitted he was in debt to JDS and that Mazur notified plaintiff in December 2017, by telephone and in writing, that plaintiff's account was delinquent and that plaintiff was required to remove the airplane. In its opinion, the trial court understood this event to have occurred in December 2016. However, the evidence supplied by defendants also showed that without objection from defendants, plaintiff continued his practice of paying $400 every two months to cover his rent under the oral agreement even after receiving this notice from Mazur.

While the terms of the written lease agreement provided defendants with substantial discretion concerning the removal of the airplane from the hangar after a breach, the record—taken in the light most favorable to plaintiff—demonstrates that questions of fact exist as to whether plaintiff's previous breaches were either waived by defendants or rectified. Evidence revealed that defendant returned plaintiff's airplane to the hangar on at least two occasions, and further, defendants continued to accept plaintiff's rental payments well after he was admittedly in breach. See *Grand Rapids Asphalt Paving Co v City of Wyoming*, 29 Mich App 474, 483; 185 NW2d 591 (1971) (stating waiver of a breach of contract can be evidenced by the nonbreaching parties "declarations, acts, and conduct . . . ."). Taken as a whole, and viewed in the light most favorable to plaintiff, *Zaher*, 300 Mich App at140, record evidence reveals that the trial court erred in granting summary disposition in favor of defendants concerning their breach-of-contract claim. *Id*.

This conclusion also reveals the trial court's error in granting summary disposition in favor of defendants concerning plaintiff's breach-of-contract claim. The trial court found that plaintiff could not sustain a breach-of-contract claim against defendants because plaintiff had been the first party to substantially breach the lease agreement. See *Able Demolition v City of Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007) (quotation marks and citations omitted) (discussing the rule in Michigan law that the party who first substantially breaches a contract "cannot maintain an action against the other contracting party for his subsequent breach or failure to perform."). There was no dispute as to whether plaintiff breached the terms of the oral agreement by failing to pay his rent on a timely basis, and whether plaintiff was the first to breach the contract. However,

such conclusions do not end the analysis of this issue because the evidence also showed that the contractual relationship continued for several years after the initial breach. As previously discussed, defendants' continued acceptance of plaintiff's lease payments following his initial breach gives rise to an inference that defendants waived plaintiff's breach. If this was the case, long-standing case law dictates that a party who waives a breach through continued acceptance of a breaching party's performance may still be held liable for its own breach of the contract. *Schnepf v Thomas L McNamara, LLC*, 354 Mich 393, 397-398; 93 NW2d 230 (1958). Hence, at a minimum, our review of the record reveals genuine questions of material fact concerning the contractual relationship between the parties and the lasting effect of plaintiff's breaches. As a result, the trial court's grant of summary disposition relative to plaintiff's breach-of-contract claim was improper. Accordingly, we reverse that portion of the trial court's opinion.

Plaintiff also argues that the trial court erred by granting summary disposition in favor of defendants concerning plaintiff's silent fraud claim against Mazur.

> A claim for fraudulent misrepresentation or actionable fraud generally requires a showing that
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> > (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.
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> Furthermore, under the silent fraud doctrine, a cause of action is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure. Further, there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud. [*Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004) (quotation marks and citations omitted).

Additionally, "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 466; 683 NW2d 587 (2004). While predating *Fultz*, this Court expressed a similar principle in *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 372-373; 532 NW2d 541 (1995). Distinguishing fraud in the inducement from other forms of fraud, this Court stated "[w]ith respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort." *Id*. at 373.

Here, as the trial court correctly opined, plaintiff failed to allege any noncontractual duty owed to him by Mazur. While plaintiff alleged Mazur had an affirmative duty to inform him that Mazur was not adhering to the terms of the contract, a misrepresentation, plaintiff asserted, was compounded by Mazur continuing to accept plaintiff's monthly rental checks, these allegations arose from the parties' contractual relationship, not from a separate duty owed by Mazur. Hence, plaintiff's failure to identify a separate, noncontractual duty, owed him by Mazur to disclose removal of the airplane from the hanger is fatal to his claim of error. *Huron Tool & Engineering*

Co, 209 Mich App at 372-373; *Fultz*, 470 Mich at 466. Accordingly, we affirm the trial court's grant of summary disposition to defendants for plaintiff's claims of silent fraud.

Affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. Neither party having prevailed in full, no costs are awarded. MCR 7.291(A). We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra